

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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BMG RIGHTS MANAGEMENT (US) LLC, :
et al., :
Plaintiffs, :
vs. : Case No. 1:14-cv-1611
: :
: :
COX ENTERPRISES, INC., et al., :
Defendants. :
-----:

HEARING ON MOTIONS

October 30, 2015

Before: Liam O'Grady, USDC Judge

APPEARANCES:

Jeffrey M. Theodore, William G. Pecau, Walter D. Kelley, Jr.,
John M. Caracappa, Michael J. Allan, Jeremy D. Engle, and
Stephanie L. Roberts, Counsel for the Plaintiffs

Andrew P. Bridges, Brian D. Buckley, Guinevere Jobson, and
Craig C. Reilly, Counsel for the Defendants

1 THE CLERK: Civil action 1:14-cv-1611, BMG Rights
2 Management LLC, et al. versus Cox Communications, Incorporated,
3 et al.

4 If counsel would please identify themselves for the
5 record.

6 MR. KELLEY: Walter Kelley on behalf of the
7 plaintiffs. With me are Jeff Theodore, Will Pecau, Mike Allan,
8 John Caracappa, Stephanie Roberts, and Jeremy Engle.

9 Mr. Allan, Mr. Theodore, and Mr. Pecau are going to
10 split up the various arguments today.

11 THE COURT: All right, thank you.

12 Good afternoon to each of you.

13 MR. THEODORE: Good afternoon, Your Honor.

14 MR. REILLY: Good afternoon, Your Honor. Craig
15 Reilly here for the defendants, together with my co-counsel
16 Andrew Bridges, Guinevere Jobson, Brian Buckley. And our
17 client representative, Marcus Delgado, from the legal
18 department at Cox.

19 THE COURT: All right.

20 MR. REILLY: Mr. Bridges will address the Court on
21 most of the summary judgment motion issues. And Mr. Buckley
22 will address the Court if the Court is going to hear argument
23 on the motion to strike Mr. Rosenblatt's declaration.

24 THE COURT: All right. Thank you, Mr. Reilly.

25 Good afternoon to each of you.

1 Why don't we start with that. I am not going to hear
2 argument on the Rosenblatt declaration. I look at that as if
3 -- and I am going to deny the motion to strike because I
4 reviewed it. It doesn't say anything other than I understand
5 from Cox that they do this and I think what they did was
6 reasonable.

7 And certainly it's almost like reading Nimmer or
8 Menell or Goldstein on copyright law, he is providing his ideas
9 on what he thinks is reasonable in the safe harbor area. So
10 I've admitted it for that purpose. It certainly wouldn't be
11 admissible testimony. And I think that that probably was why
12 it was brought before me now versus the day before trial or
13 something.

14 There is nothing that Mr. Rosenblatt has said which
15 he has personal knowledge about. We have got affidavits from
16 four different Cox employees who are either engineers or
17 supervisors in charge of their abuse program. And those, of
18 course, would be the witnesses who would be relevant to the
19 safe harbor and termination decisions that were made by Cox.

20 Mr. Rosenblatt is not qualified to make judgments
21 about the law, and those are provided in jury instructions,
22 which I'm sure we'll have lots of conversations about.

23 But I equate Mr. Rosenblatt to a Commissioner of
24 Patents, Mr. Messingale -- is that right, am I pronouncing that
25 correctly -- who is going to come up and testify about how the

1 procedures of the Patent Office operate and how a patent
2 examiner goes about his business. That is never admitted here
3 in this court. I don't think it's of assistance. And although
4 he may be qualified as an expert to talk about the Patent
5 Office procedures, when he gets into substance it's just his
6 view.

7 So in terms of whether you thought perhaps Mr.
8 Rosenblatt would be a witness at trial, he won't be. But his
9 declaration is accepted for today.

10 As I said in my order earlier this week, I think one
11 of the summary judgment motions concerns the ownership issue,
12 and I asked for further briefing on Round Hill, that entity.
13 And that I will get next week, I hope, and I will further
14 consider that.

15 But I otherwise find that the plaintiff has
16 demonstrated ownership over the other works. And I believe
17 that's an issue that the Court decides as a matter of law, and
18 I don't think there is any argument about that, but I find that
19 BMG is entitled to bring the action against Cox as to at least
20 the works that I haven't identified as requiring further
21 briefing.

22 There was minimal briefing on the damages issue or
23 the unclean hands. I don't know whether you wanted to argue
24 that today. I will hear briefly if you do. But I really think
25 that we ought to talk today about the safe harbor provisions

1 and that statute and some of the things that it lacks.

2 And also whether the standard of infringement is
3 going to include "making available" as a means of proving
4 infringement.

5 I will give you an opportunity to convince me
6 otherwise, but I don't think that the Hotaling case out of the
7 Fourth Circuit is applicable in this electronic world.

8 I think that the judges in Massachusetts and Arizona,
9 I guess, in London-Sire and Atlantic Recording I think got it
10 right in that it should be limited to the library context, the
11 physical world that they were dealing with in that case.

12 And I think when we're dealing with file-to-file
13 sharing and the presence -- the possession of these copyrighted
14 works in the electronic area, I think that "making available"
15 is inconsistent with the language of the statute itself, which
16 requires distribution. Not publication, but distribution.

17 I also will give you an opportunity to briefly
18 convince me why "material objects" does not include electronic
19 files because they're not tangible physical files, but I think
20 that the Act does include electronic files.

21 And then we'll talk about the safe harbor.

22 So who wants to argue the "making available" issue
23 for BMG, I'll hear from you first.

24 MR. PECAU: I am, Your Honor. It's Will Pecau for
25 BMG.

1 THE COURT: All right.

2 MR. PECAU: So, Your Honor, the "making available,"
3 just for a clarification purposes, Your Honor, the "making
4 available" provision isn't only what BMG is relying on.

5 And as the London-Sire case pointed out, Your Honor,
6 the fact that these electronic files are made available by the
7 various Cox subscribers for copying on BitTorrent can be seen
8 as -- can be determined by evidence by the jury that in fact
9 not only are the files made available, but because of the way
10 BitTorrent works, that there is copying and distribution as
11 well.

12 THE COURT: And I acknowledge that, and I believe
13 that there is a circumstantial way of proving infringement.
14 And that was going to be the second prong of my questioning,
15 was how does BMG intend to prove circumstantially that there
16 has been distribution if merely the availability of the
17 copyrighted work is insufficient?

18 So if you want to address that now, that's fine.

19 MR. PECAU: I would be happy to do that, Your Honor.
20 Well, there is lots of evidence to show that there actually has
21 been distribution. Direct evidence of it is that Rightscorp
22 downloaded 100,000 full copies of musical compositions that the
23 plaintiffs claimed even before the case was brought. So that's
24 a --

25 THE COURT: Where did that come from?

1 MR. PECAU: Where did that come from?

2 THE COURT: That same from not Cox, but from
3 customers of Cox?

4 MR. PECAU: Right. Yeah, what it was, Your Honor, is
5 that one of the things that Rightscorp can do, they have these
6 bit torrent files --

7 THE COURT: Right.

8 MR. PECAU: And it can determine from those bit
9 torrent files whether Cox subscribers are seeding the various
10 songs. Which means that they have the files, they have the
11 files in their computers, and they're letting the swarms come
12 in and take these files of the plaintiffs' musical works.

13 THE COURT: That's making available?

14 MR. PECAU: Right.

15 THE COURT: All right. So I understand that. Where
16 is the evidence that goes beyond that? And dig down for me so
17 I understand how a trial would go.

18 MR. PECAU: All right. So one of the things that
19 Rightscorp did to confirm that in fact full files were being
20 made available, full files of the plaintiffs' compositions, is
21 that it was able by means of tracking these bit torrent files
22 made available by Cox subscribers, that they could go onto that
23 pier, to the Cox subscribers' files and actually download the
24 entire song. And they did that 100,000 times.

25 Obviously, they didn't do it for 1.8 million times

1 because just the amount of computer memory that it would take
2 would be too much. But to confirm that their system actually
3 worked, that's what they did. And our expert confirmed that
4 that's what they did and it was successful.

5 So that is direct evidence of actual distribution by
6 Cox subscribers. That's one thing.

7 The other thing is that --

8 THE COURT: Do you have evidence that third parties,
9 not investigators -- and I understand Arista Records and Judge
10 Woods' findings on that, but do you have evidence that third
11 parties went on and obtained those copyrighted works from the
12 subscribers' files?

13 MR. PECAU: Well, Your Honor, I think that --

14 THE COURT: I'm not saying it's necessary, but I am
15 kind of curious.

16 MR. PECAU: Well, I don't think we have any evidence
17 that third -- we didn't get any evidence that third parties
18 actually downloaded the entire files, but we do have evidence
19 that looking at the hash values of the bit torrent files that
20 the Cox subscribers had -- and you know, Your Honor, from
21 reading all these papers that those things are like
22 fingerprints, that they show exactly whether the file was one
23 of the plaintiffs' musical compositions.

24 What our experts have determined from that, and I
25 think Mr. Boswell as well, who is a Rightscorp employee, what

1 they determined by looking at this was that actually some of
2 the hash values that Cox subscribers had were exactly the same.
3 Which meant that those Cox subscribers had gotten that material
4 and had shared that material through a bit torrent. So that's
5 additional evidence that occurred.

6 Of course, Your Honor, I already referred to the
7 circumstantial evidence itself that just the nature of bit
8 torrent, the way it works, that once you start downloading
9 material as a leecher, you automatically become a seeder as
10 well. So that the bit torrent files are going up and down at
11 the same time.

12 And that information alone, based on the fact that,
13 as the London-Sire court pointed out, the fact that this stuff
14 is made available, that these folks did everything up to -- I
15 mean, the evidence showed everything up to distributing it,
16 that direct evidence, the circumstantial evidence is more than
17 enough for a jury to conclude that there was actual
18 distribution and copying going on in a massive scale.

19 Now, moving to the question that you raised, Your
20 Honor, initially, and that is whether "making available" alone
21 would be sufficient for copyright infringement and would
22 violate the distribution rights in section 106(3).

23 As Your Honor knows, the Hotaling decision actually
24 has been followed by other courts in the digital context.

25 THE COURT: Right, that's the Sony BMG case?

1 MR. PECAU: Right. And the rationale of Hotaling
2 certainly makes sense in the digital context as well. I mean,
3 one of the reasons that the Court found that the copyright
4 owners' rights were infringed by this "making available" is
5 because the library didn't keep records of who actually saw it.

6 Well, we have the same problem here. And you do have
7 the same problem in the digital context. Is that, you know,
8 for example, Cox has actually destroyed the subscribers' names,
9 so that's not available. And Cox is a gatekeeper of those
10 subscribers' names. So it's not available. So that's one
11 reason why it makes sense to have a broader view of this
12 distribution right.

13 Now, Your Honor knows, of course, that Congress has
14 thought that the distribution right included making available.
15 And that's why it didn't change the statute when the United
16 States became a signatory of the WIPO Copyright Treaty. And
17 the Copyright Office had that same view. And I think the most
18 persuasive thing is Professor Nimmer and Professor Menell who
19 actually went back into the history of the Copyright Act and
20 determined through exhaustive analysis that the whole point of
21 the use of the word "distribution" was to include publication,
22 which, of course, traditionally included "offers for sale" as
23 well.

24 THE COURT: Yeah, but they make the argument for both
25 sides.

1 MR. PECAU: Right.

2 THE COURT: Especially Menell. And he just goes
3 through, well, back in the '80s and '90s, the Court said this
4 and then in the 2000s the Court says that. And what I think is
5 that, you know, distribution is the equivalent of publication
6 and, therefore, "making available" is sufficient. But the
7 statute doesn't say that, of course, and that's my problem, is
8 in a literal reading without using those professors -- you
9 know, what am I looking at on a piece of paper? That's the
10 problem.

11 MR. PECAU: Well, the word "distribution" is
12 ambiguous. And as Menell pointed out, that it could mean lent.
13 And lent could be, for example, you know, he lent his influence
14 to other people.

15 So, I mean, lending could have a broad meaning, and
16 distribution can have a broad meaning as well. I mean, other
17 courts in very similar contexts, I think it was the Seventh
18 Circuit -- I think it was either the Seventh or the Eighth
19 Circuit was looking at the term "publication" in terms of the
20 criminal act, which virtually uses the same words. And they
21 determined that publication -- I mean, that distribution
22 clearly included publication.

23 So even in that context, publication and distribution
24 were determined to be the same thing. And I certainly think
25 that with the precedence in this court, in the Fourth Circuit,

1 combined with all this other authority, that Your Honor should
2 find that "making available" is a violation of a copyright
3 owner's rights under the Copyright Act.

4 THE COURT: Okay. Thank you.

5 MR. PECAU: Thank you.

6 MR. BRIDGES: Good afternoon. Thank you, Your Honor.

7 THE COURT: Certainly.

8 MR. BRIDGES: I would like to start at first with
9 principles, very first principles of copyright law. It is a
10 federal statutory tort, and Congress has defined the rights of
11 a copyright holder in section 106(3). And Mr. Pecau said that
12 it's vague or ambiguous, I don't know if he suggested it's
13 unintelligible. That is the prerequisite for looking at
14 legislative history the way Professor Menell did.

15 What is interesting is Professor Menell persuaded
16 David Nimmer to change Nimmer on Copyright. David Nimmer is
17 the son of the father/son pair who are the author. And I think
18 the father started out the other way, Goldstein is the other
19 way, Patry is the other way. It could be an academic debate,
20 but I am not here, Your Honor, to engage in an academic debate.
21 I am here to construe the law and to try to explain the law.

22 I would like to put on the screen, if I may, the text
23 of the law.

24 THE COURT: You go ahead and handle the case the way
25 you want to this afternoon. I have obviously looked at the

1 statute, but go ahead.

2 MR. BRIDGES: Right. I would like to have it up
3 there because --

4 THE COURT: Whatever you want to use is --

5 MR. BRIDGES: I appreciate it. If would we could to
6 the next -- section 106 has the three different -- I am sorry,
7 has six different right of the copyright owner.

8 I would like to go to the next slide, please, because
9 this actually has four elements. The first element is the
10 action, it's "to distribute." It is an act. It is not an
11 offer to distribute. It is not a state of readiness. It is
12 the verb "to distribute."

13 Then there is an object of the act, "copies or
14 phonorecords."

15 Section 101 of the Copyright Act has all the
16 definitions, and it defines "copies" and "phonorecords" as
17 material objects. And it does also refer to "fixation in a
18 tangible medium of expression."

19 And "to the public" is an element, but I won't
20 belabor that here.

21 And then there is the phrase that I haven't heard the
22 other side address ever, "by sale or other transfer of
23 ownership, or by rental, lease, or lending."

24 And that means that there are four elements here.
25 One is the act. One is the recipient to the public. One is

1 the object. And one is the transactional requirement.

2 And actually, the transactional requirement here
3 reinforces the material object nature of copies and
4 phonorecords because this aims at material objects and their
5 movements in commerce.

6 And there have been several arguments as to why that
7 should not apply. One is the WIPO copyright treaty. And the
8 question is, does this language need to be interpreted
9 differently or expanded to meet international obligations. The
10 argument is, should we not apply the statute as Congress wrote
11 it because we have some international obligations?

12 I would like to put up, if I may, the WIPO copyright
13 treaty because what's interesting is that in the WIPO copyright
14 treaty there is an article called the Right of Distribution, it
15 is Article 6. And the Right of Distribution talks about the
16 making available of the originals and copies of their works --
17 it's right here on the screen now. The making available to the
18 public of the original and -- I'm sorry, I touched the screen
19 and I have made marks on it, I didn't mean to -- of the
20 original and copies of their works through sale or other
21 transfer of ownership.

22 So the WIPO treaty, where it talks about distribution
23 is actually narrower than U.S. copyright law. That's why we
24 don't need to change U.S. copyright law to meet this "making
25 available" that relates to distribution.

1 And if we can scroll down to the Agreed statement --
2 it's all the way at the end, I think. The Agreed statement is
3 an explanation, it's a commentary on what these terms mean.
4 And the Agreed statement on Article 6 -- there we go. Oops,
5 oops, up please. Right there in the middle. As used in these
6 articles, the expression "copies" and "original and copies"
7 being subject to the right of distribution and also the right
8 of rental refer exclusively to fixed copies that can be put
9 into circulation as tangible objects.

10 So the WIPO treaty in fact reinforces the material
11 object and the transactional requirement of section 106(3).

12 Now, there is a little sleight of hand that is going
13 on among those industries that really want to expand it. And
14 the sleight of hand is that Article 8 of the WIPO copyright
15 treaty is the right of communication to the public. But that
16 in fact corresponds to our right of public display and right of
17 public performance. And the language there tracks the
18 language -- the definitions of "public performance" and "public
19 display" in section 1 of the Copyright Act.

20 So if one looks at the statutory language, there is a
21 material object requirement and a transaction requirement. If
22 one looks at the WIPO treaty, there is a material object
23 requirement and a transaction requirement. And then if one
24 looks at Nimmer father and Goldstein and Patry and Agee versus
25 Paramount and National Car Rental, there was long agreement

1 until recently fueled by Menell.

2 And if you look at Menell's article -- Peter and I
3 are friends, we've talked about this a fair amount. The
4 motivation in Menell's article is, well, it's just so hard to
5 prove a violation.

6 I'm not here to argue that transmitting files over
7 the Internet is not a violation. It's not a violation of the
8 right of distributing copies or phonorecords to the public by
9 sale or other transfer of ownership, or by rental, lease, or
10 lending.

11 It would be a violation, if at all, of the
12 reproduction right when somebody receives the file. And
13 somebody who sends the file is the contributory infringer of
14 the reproduction right when the person who receives the file
15 stores it, because that's the reproduction. So there is no
16 need to expand this to make -- to make sure that these things
17 are infringing.

18 What it does do is it imposes on plaintiffs an
19 obligation to prove their case. And if they're going to allege
20 contributory infringement of the reproduction right, then they
21 need to prove a reproduction. And then they need to prove
22 contribution to that reproduction.

23 And we're in an environment where people say, we
24 don't want to have to prove an actual reproduction. We want to
25 show that somebody had it and that's good enough.

1 And then there was one last comment Mr. Peca made.
2 I think he was referring to section 506 of the criminal statute
3 that refers to a particular criminal violation in terms of
4 distribution and reproduction of works prepared for
5 distribution. And what is notable is that that section, it's
6 in section 506, I don't know that we have it -- by the way, in
7 our reply brief there is a statutory appendix at the back. We
8 thought it useful to have a statutory appendix for the Court so
9 that we can all stay focussed on the statute.

10 Section 506(a)(1) talks about -- the violation that
11 they said shows that it's "making available" is 506(a)(1)(C).
12 It says, "distribution of a work being prepared." It doesn't
13 say, "distribution of copies or phonorecords by sale or other
14 transfer of ownership, rental, lease, or lending."

15 Congress knows how to make these fine distinctions.
16 Congress has people crawling all over it to change copyright
17 law the way various interests want Congress to change copyright
18 law.

19 So my point here, Your Honor, is I think the statute
20 is absolutely clear. I think that the WIPO treaty absolutely
21 reinforces the clarity of the statute.

22 And one other thing. If one expands this concept,
23 then if really facilitating a reproduction is now a
24 distribution, it's actually going to upset commercial relations
25 because people get licenses to do certain things. And they may

1 get licenses to make a reproduction or to authorize a
2 reproduction. But if authorizing a reproduction or making a
3 reproduction is now also a distribution, then licenses that
4 cover one may not cover the other.

5 There is no need to create a redundant interpretation
6 of section 106(3). So that's my point on that, Your Honor.

7 I will say, the Hotaling case, very interesting case,
8 and one understands the reasoning behind it, but it was a
9 material object, and it was a lending institution. And
10 material object, it was a copy, the microfiche is a material
11 object in which the work is fixed. And it dovetails with the
12 transactional requirement, a sale or other transfer of
13 ownership or by rental, lease, or lending.

14 And to me, the hard question there is, was use of a
15 form of lending? And the Fourth Circuit seemed to think that
16 it was there. It also did acknowledge that it's construction
17 of 106(3) was affected by the concern about prejudice in that
18 case.

19 I would like to say one thing because they said that
20 Cox destroyed records or whatever. We have been through that
21 with Judge Anderson. And Judge Anderson has addressed their
22 concerns. They got from Cox a number of records about
23 subscribers. They got I think 138 or 139 records of
24 subscribers. And they had an opportunity to subpoena them, to
25 question them. They got one declaration back that was

1 completely unhelpful for them.

2 And I don't know if they contacted 139 and got
3 nothing as well, but they had an opportunity. And courts
4 regularly have opportunities to find out what customers know
5 about what's going on. And maybe they -- I don't know what
6 they did.

7 One last point. Your Honor, Mr. Pecau kept referring
8 to subscribers and actions of subscribers. There is absolutely
9 no evidence in this case about what Cox subscribers did.

10 Their expert, Mr. Bardwell, defined a subscriber as
11 an Internet node. And there are a number of cases, the 2015
12 Malibu Media case, the VPR case, other cases have made it clear
13 that actions or states attributed to IP addresses cannot
14 necessarily be attributed to subscribers.

15 And that's one of the problems here. There are many
16 ways by which nonsubscribers -- it could be the babysitter who
17 comes every Friday, it could be open wireless, there are so
18 many ways --

19 THE COURT: Well, when you have 100,000 of them, what
20 does that mean?

21 MR. BRIDGES: Your Honor, it doesn't --

22 THE COURT: Is that circumstantial evidence that a
23 jury can consider? I mean, each of these computers has an
24 individual address, and Cox keeps the records by -- or
25 Rightscorp identifies the receiver by the address of the

1 computer. Cox had but no longer has many of the subscriber
2 information which would identify the subscriber to the computer
3 that was identified by Rightscorp.

4 But I mean, what's the burden on plaintiff in a case
5 like this? Do they have to do anything more than just identify
6 the massive amount of computers that are subscriber or
7 subscribers to Cox and that Rightscorp can identify downloaded
8 this material? What's your position on their burden?

9 MR. BRIDGES: Well, first I need to make one factual
10 clarification, and then I will come back to their burden.

11 THE COURT: Okay.

12 MR. BRIDGES: The factual clarification is that Cox
13 does not identify computers to subscribers. Cox identifies
14 modems and access points to the Internet to subscribers.

15 THE COURT: So is there a disconnect between what
16 Rightscorp did and how Cox identifies its subscribers?

17 MR. BRIDGES: Well, Cox knows who is paying for
18 Internet access that is associated with a particular modem. It
19 doesn't know who is using that modem. It could be babysitters
20 coming on Fridays. It could be neighbors next door.

21 I think we got -- I mean, when the personal
22 information -- when we release personal information and warned
23 people that we were divulging their names, we got a letter from
24 a 60-year-old retired school teacher who says, I don't know
25 anything about BitTorrent and I could care less about One

1 Direction. And these --

2 THE COURT: We're getting out of field. You answer
3 my question and then we'll move on from there. As you
4 understand it, how is BMG using Rightscorp's software going to
5 identify the computers who were found to possess copyrighted
6 work and can tie them to Cox as the ISP?

7 MR. BRIDGES: It discerns an IP address, the access
8 point of whatever resources they were looking at. It then
9 easily looks up and sees that that is an access point
10 associated with Cox.

11 The way you then do it is if you think that person is
12 an infringer, as in Hard Drive Productions, you file a lawsuit
13 against the alleged infringer as a John Doe and you subpoena
14 the ISP for the information. Then you find out who the
15 subscriber is. And then you --

16 THE COURT: That is Malibu Media, that's what they
17 did. BMG did not do that here. And what they did was to
18 identify these hundreds of thousands of IP addresses of
19 computers. And you're using the word "modem" to define how Cox
20 identifies its subscribers versus the computer, and I'm
21 confused about that.

22 MR. BRIDGES: Your Honor, getting all electronics
23 into this courthouse, but some courthouses have wireless
24 networks. Those wireless networks converge on a modem. And
25 Cox knows --

1 THE COURT: Right. We have one, we're just not
2 allowed to use it. I understand what a modem is.

3 MR. BRIDGES: Right.

4 THE COURT: But Cox can identify a subscriber's
5 computer, can it not?

6 MR. BRIDGES: No, Your Honor. No, Your Honor, it
7 cannot. That's the problem. As a matter of fact, all it can
8 do is identify whose name and address are on the account that
9 corresponds to that modem's access to the Internet. And then
10 who accesses that --

11 THE COURT: You get a notice from somebody other than
12 Rightscorp which doesn't have a demand in it, and you send it
13 out to a customer. How do you determine who the customer is?

14 MR. BRIDGES: Because when they tell us what the IP
15 address is at a certain time, we can find out whose modem it
16 was. And we send the notice to the person whose modem was
17 associated with that IP address. And we have no clue --

18 THE COURT: So it is not something you do until you
19 get a notice of infringement?

20 MR. BRIDGES: That's right, Your Honor. Well, we
21 know -- well, it has billing records in its account system. It
22 says, this -- there are a couple of different things that come
23 together.

24 THE COURT: In the commercial environment, there may
25 be lots of computers hooked up to one modem. In a home, maybe

1 just one.

2 MR. BRIDGES: Your Honor, in a home it may be eight
3 or ten. It may be -- when I'm at home with my family, I would
4 say we probably have at least six or seven devices on the modem
5 at once, my wife, and myself, and two kids, and I actually put
6 my phone into the wireless network, and others do. And then we
7 don't have a video cam at home, but that might go into the
8 modem.

9 And when I go home and I look up and connect to
10 wireless, I get an option of about four different wireless
11 networks. Only one is mine. There are others there.

12 THE COURT: Right.

13 MR. BRIDGES: And just to bring this point home.
14 Rightscorp early on in a different aspect of its argument -- or
15 the plaintiffs were arguing that Cox had knowledge of their
16 Dashboard because they had evidence of access to their
17 Dashboard.

18 THE COURT: Dashboard, what's Dashboard?

19 MR. BRIDGES: Sorry?

20 THE COURT: Define Dashboard as you're using it.

21 MR. BRIDGES: Their Dashboard was a Web site that
22 they said they created and offered to Cox so that Cox could
23 come and see all this information that they wanted Cox to read.
24 And they said that they believed that Cox accessed their
25 Dashboard because they tracked it to a Cox IP address. And,

1 therefore, they really believed -- and they were sending
2 discovery and they thought it was coming from Cox.

3 And we asked them -- we in the statement of material
4 facts, I think it was the statement of material facts, or was
5 it and admission -- but anyway, they admitted at one point --
6 or they refused to admit that they had no evidence that Cox
7 accessed the Dashboard. And they said the evidence was there
8 access from a Cox IP account. That's their evidence for why
9 Cox accessed it.

10 But you know what it really was? It was an IP
11 account associated with a Ritz Carlton Hotel in Laguna Niguel,
12 California on the very day that Rightscorp's principles were
13 making an investor presentation at that hotel. So Rightscorp
14 is there accusing Cox of seeing its Dashboard from an IP
15 address that it appears that Rightscorp was using that day.
16 That's the key problem.

17 What is the proper way for a copyright holder to
18 proceed? It's a standard procedure. If you think there is an
19 infringer out there, a significant infringer, you file a John
20 Doe lawsuit and then you track it down properly. And that has
21 not happened here. And it is something that could be done.

22 And that's not to -- it's a different part of the
23 case, but Cox would be sending these notices on if the notices
24 were different. Cost has not been trying to interfere with
25 this. Cox is sending notices on for countless other copyright

1 holders. So it is a self-created problem on Rightscorp's part.
2 There would be ways to accomplish this goal, but Rightscorp and
3 the plaintiffs have avoided every reasonable way of
4 accomplishing the goal.

5 THE COURT: All right. Thank you, sir.

6 MR. BRIDGES: Thank you, Your Honor.

7 MR. PECAU: Your Honor, may I --

8 THE COURT: Yes, you may reply.

9 MR. PECAU: We went pretty far afield. Can I address
10 a number of these things?

11 THE COURT: Address whatever you would like to.

12 MR. PECAU: Thank you, Your Honor. Well, first of
13 all --

14 THE COURT: Well, within the infringement --

15 MR. PECAU: Right, he went all over the place. Well,
16 first of all, I would like to start with this idea of
17 distribution. And the thing is, when you think about what
18 distribution is, distribution also includes -- and I think
19 Alexandria is like this, but I know Washington, D.C., and New
20 York is like this, you have free newspapers. Right? They
21 stick them in one of those bins, people walk by, they pick it
22 up. But putting the papers in the bins for picking up, that's
23 distribution.

24 And also, we talked about lending. I did mention
25 lending before, but I'll mention it again. So what happens in

1 the digital world, what we have evidence of the Cox users
2 doing, in addition to all the other circumstantial evidence and
3 direct evidence that we have, we have evidence that just like
4 putting newspapers in a bin for outside, what they do here is
5 each of these Cox subscribers, they put the file -- plaintiffs'
6 works, into a bin, into a file, that's available for people to
7 walk by and pick it up, and that's lending.

8 And the thing is, Your Honor, you know, if you think
9 about a newspaper, that's pretty easy. You know, you have like
10 a half a dozen newspapers, you put in a bin somebody, can pick
11 it up.

12 The real danger here, the real evil that is
13 occurring, the amount of massive theft that is going on is that
14 when one of Cox's subscribers puts it's in their file, in that
15 bin, everybody in the world can steal that music. And that's
16 what's happening. And that's why it's a distribution. That's
17 why it's a lending. And that's why it violates the copyright
18 law.

19 Now, Cox in their statement referred to WIPO. And
20 they only refer to section 6, and then quoted section 6, but
21 they didn't show you, Your Honor, section 8.

22 Can we put up section 8 of the WIPO? That's Article
23 6. Now let's go to Article 8, please. Well, that's great,
24 thank you.

25 Now, in the case Your Honor referred to before in

1 which the court went through the history, the significance of
2 WIPO, the court said, look, clearly in WIPO there is a making
3 available right. And the making available right does appear in
4 two places. One in Article 6, which Cox's attorney referred
5 to, and the other is in Article 8.

6 And Article 8, everybody knows what Article 8 means.
7 Article 8 means that authors of literary and artistic work
8 shall enjoy the exclusive right of authorizing any
9 communication to the public of their works by wire or wireless
10 means. And that clearly includes digital availability.

11 Okay. Then the other thing, and I think this is a
12 supremely important point here, is Cox's argument that the
13 distribution right and the reproduction right doesn't include
14 copying or distribution of digital works. I mean, this is just
15 wishful thinking of a copyright infringer.

16 It is settled law that the distribution of digital
17 copies of copyrighted works is copyright infringement. That's
18 Grokster, the Supreme Court, that's Napster, London-Sire, every
19 court who has ever considered this issue has determined that if
20 you are making available for distribution or if you're copying
21 digital works, you're infringing copyrights.

22 Now, the only way Cox can make its argument is by
23 truncated definitions. So Cox refers to material objects. And
24 can we go to the definition of "copies," please, in the
25 copyright law. And this is in section 101.

1 THE COURT: So we're out of WIPO now? We're talking
2 about --

3 MR. PECAU: We're out of WIPO. We're back in the
4 United States, Your Honor. Okay.

5 Copies are material objects, that's true. But what
6 is a material object in copyright law? It's anything from work
7 -- a work may be perceived, reproduced, or otherwise
8 communicated, either directly or with the aid of a machine or a
9 device. And what that means, it includes copies that can be
10 made with computers. All right.

11 Now, Cox's attorney also referred to tangible. You
12 know, that things have to be fixed in a tangible medium.
13 That's true, but that's not the entire definition of "fixed."
14 Can we go to the definition of "fixed," please.

15 Okay. A work is fixed in a tangible medium of
16 expression when its embodiment in a copy or phonorecord -- and
17 I will do some ellipses here -- permitted to be preserved,
18 reproduced, or otherwise communicated for a period of more than
19 other than a transitory duration.

20 So what happens when these Cox subscribers are
21 putting files on their computer, Your Honor? They are allowing
22 these -- they are fixed at that point because they can be
23 copied. And that's the whole point of this suit and bit
24 torrent, massive copying.

25 All right. So the next thing that we had moved over

1 into was Cox's argument that because BMG and Round Hill --
2 because of the nature of technology, and because Cox is a
3 gatekeeper of the names, do not know the names of the
4 subscribers or the users who are using its system. But the law
5 is absolutely clear that you don't have to identify the name of
6 each individual when you're dealing in secondary liability
7 cases. That's the whole point of secondary liability cases.
8 All you have to show is that users of Cox's services are
9 infringing plaintiffs' copyrights.

10 You don't have to identify each of the users. You
11 have to show that it's going on, and then you have to satisfy
12 the elements, obviously, of contributory infringement and/or
13 vicarious liability.

14 THE COURT: So how are you going to show that these
15 are users?

16 MR. PECAU: Well, Your Honor --

17 THE COURT: You have got IP accounts.

18 MR. PECAU: Right.

19 THE COURT: And you don't have subscriber
20 information. And you have got lots and lots of IP accounts.

21 MR. PECAU: Right.

22 THE COURT: Just by numbers circumstantially?

23 MR. PECAU: No, no, no, Your Honor. Let's talk a
24 little bit about what's going on and what Rightscorp can
25 identify with these bit torrent files.

1 THE COURT: Please.

2 MR. PECAU: So what it's identifying with the bit
3 torrent file is through what we had discussed before with the
4 .torrent files. What Rightscorp can identify and what it
5 advises Cox is the IP address, the computer port, the name of
6 the musical composition, and the date and the time that it took
7 place. Okay.

8 With the IP address and the port, Cox knows the
9 modem, they know the subscriber through which that
10 information -- which files they're making available.

11 Now, it doesn't really make any difference who the
12 user is. It's the fact that it's the subscriber, and Cox has
13 control over that subscriber and the folks that use it.

14 And in fact, if you look at its acceptable use
15 policy, Cox itself says that as a subscriber you're responsible
16 for all the stuff that you're pushing through our service. I
17 mean, that's what they require.

18 And the law itself doesn't distinguish between
19 subscribers and users. It says that if your system is being
20 used to enable this kind of infringement, you have knowledge of
21 it and you have control over it, which they certainly do, you
22 have a responsibility to do something.

23 And Cox clearly knows the folks that are doing that.
24 Even in the few instances where it actually does something, you
25 will see lists of, under a particular subscriber, lists of all

1 the infringement over the years, the chronic copying, making
2 available that these folks are doing, and that they are never
3 terminated.

4 So Cox knows the subscribers, they know what's going
5 on, and this case is really about them choosing to do nothing.

6 So let's see what else. I mean, there are so many
7 things that you guys covered. Let's see. So we covered
8 lending. All right.

9 I think I covered all of the things -- oh, we talked
10 about the Dashboard, Your Honor asked about the Dashboard.
11 That's the last thing I'll discuss.

12 What the Dashboard is is that Cox makes -- I'm sorry.
13 Rightscorp makes available to the ISPs to whom it sends these
14 infringement notices a Dashboard, which actually you can search
15 and you can summarize and you can see for each one of those IP
16 addresses the amount of infringement that's going on, the song,
17 and all the rest of that stuff. It's searchable and you can
18 look at it.

19 And in every single one of the notices of
20 infringement that Rightscorp sent to Cox, in that it said,
21 well, here is a notice, this is what this person is doing or
22 this subscriber, and you can go back and look at our Dashboard
23 and you can see all the times that they're doing this. All
24 right.

25 Now, Cox says that they didn't look at it. And, you

1 know, they probably didn't look at it, and that is part of
2 their knowledge here. It's the willful blindness that fits
3 with their refusal to accept any of these notices. That they
4 had this available take a look at to see if, oh, are these
5 folks really repeat infringers? How long have they been doing
6 it? It's right there.

7 And what they did is that they chose not to look at
8 it. That is exactly what we're saying, they didn't look at it.
9 You know, whether they looked at it once or they didn't look at
10 it at all, it's all the same thing, it's part of their willful
11 blindness.

12 Thank you, Your Honor.

13 THE COURT: All right, thank you.

14 MR. BRIDGES: Your Honor --

15 THE COURT: Very briefly.

16 MR. BRIDGES: I think it would be very useful if we
17 could bring up one of the notices. We can see what the
18 plaintiffs were referring to.

19 And this is the first form of notice, a form of
20 notice from BMG. This actually was not even directed at Cox
21 particularly. Later they changed their form to try to make it
22 look obviously to Cox, but they wanted Cox to send these on.
23 And it says: Your ISP has forwarded you this notice. And then
24 it goes on to say: Your ISP account. Your account.

25 Now, what did they accuse the account of doing?

1 Well, they didn't really say. They said it's been used to
2 download, upload, or offer for upload.

3 THE COURT: Well, then it specifically goes to, you
4 know, this is Bruno Mars' song, it has been infringed by a
5 computer at an IP address.

6 So I have seen these, I have seen lots of them.
7 What's your point?

8 MR. BRIDGES: My point is, an offer for upload, Your
9 Honor, is not a violation of copyright law.

10 So to begin with, when Cox got these, among other
11 things --

12 THE COURT: Well, it says, you've infringed. It's
13 not a legal document. It's a notice that they believe that the
14 customer of the ISP has infringed their copyrighted work.

15 MR. BRIDGES: That's correct, Your Honor, but in
16 coming back to what is the underlying infringement, because
17 that's where we started out, whether it's making available or
18 whatever --

19 THE COURT: You know, this is not the document to use
20 for that.

21 MR. BRIDGES: I understand that, Your Honor.

22 THE COURT: All right. So again --

23 MR. BRIDGES: When we get to knowledge, virtually all
24 cases require actual, specific knowledge of specific
25 infringements, and that doesn't meet it.

1 And then when he talks about willful blindness --

2 THE COURT: Well, we're going to talk about that in
3 the safe harbor arguments.

4 MR. BRIDGES: I will sit down for now.

5 THE COURT: Okay. Thank you. Go ahead.

6 MR. PECAU: Your Honor, I'm sorry, this is very
7 quick.

8 THE COURT: Yes. You need to come to the podium
9 though so we make sure we get this down on the record.

10 MR. PECAU: I apologize, Your Honor.

11 Your Honor, I just want to point out that at one
12 point when the parties were discussing this, back in I think
13 2011, Cox sends to Rightscorp what they would like as a sample
14 notification. And it's interesting because it's almost exactly
15 what Rightscorp says. It says -- this is what they suggested
16 that Rightscorp have in its notification: It has come to our
17 attention that Cox Communications is the service provider for
18 the IP address listed below from which unauthorized copy and
19 distribution (downloading, uploading, file serving, file
20 swapping, or other similar activities.)

21 And that's pretty much what we have in ours.

22 THE COURT: Okay. Again, this doesn't go to any
23 legal issues that we're addressing today.

24 MR. PECAU: Okay.

25 THE COURT: It's just background on how long you've

1 been fighting and disagreeing.

2 MR. PECAU: Thank you, Your Honor.

3 THE COURT: All right. So let's talk about safe
4 harbor. We have had conversation about how specific the Act
5 is. What a wonderful Act. And we get to the safe harbor
6 provision, and it doesn't define any of the meaningful terms.
7 And so, I think it's a little less laudable than you all think.

8 So we have the safe harbor provision. We have on the
9 one hand Cox getting the notices and saying, we're not going to
10 send them. They obviously have a policy. They have
11 implemented the policy. I have got four different affidavits
12 from everybody who is, one, in charge of the program, down to
13 Mr. Beck who had a fun time trashing the Digital Act and
14 professing that they weren't going to adhere to it and they
15 weren't going to terminate anybody because they need the
16 subscribers.

17 So it seems to me that these are issues of fact which
18 have got to go to a jury. And whether there was appropriate
19 circumstances, whether we have repeat offenders, whether their
20 violations were repeated or flagrant, those are issues that I
21 think a jury may have to decide.

22 And then we go to what did Cox do in terminating.
23 And then all of a sudden, what's reasonable in the termination.
24 And we then cross over to issues such as, you know, are
25 accusations sufficient, or do they have to be adjudicated

1 infringers, and that may be relevant.

2 So I see an awful lot of room here for factual
3 decisions that a jury needs to make. So those are some of my
4 thoughts on it.

5 It's BMG's motion. Do you want to go first? Go
6 ahead. And I'm sorry, your name again?

7 MR. THEODORE: I am Jeff Theodore, Your Honor, on
8 behalf of the plaintiffs.

9 THE COURT: All right.

10 MR. THEODORE: And I understand where you're coming
11 from, Your Honor, but let me try to persuade you otherwise.

12 THE COURT: Okay.

13 MR. THEODORE: I think that the critical point in
14 this case is that the essential facts, the facts -- when you
15 boil it down to whether or not Cox terminates known repeat
16 infringers, I think it's actually undisputed that they don't.

17 And there are two time periods to divide this into.
18 So they really sort of switched their policy in the fall of
19 2012. So let me talk about up until the fall of 2012, and then
20 from the fall of 2012 to present.

21 THE COURT: Whether perhaps they should be precluded
22 from using the safe harbor affirmative defense until 2012?

23 MR. THEODORE: That's right. I mean, you certainly
24 could-- we think that they should be precluded in both cases,
25 but we think at a minimum you could do one or the other.

1 So up through 2012, I really don't think that there
2 is any genuine dispute that they were not terminating. And
3 that's the period where they were as a matter of policy
4 reactivating allegedly terminated subscribers in order to claim
5 terminations for purposes of the DMCA.

6 So let's take a look at Exhibit 20 to the Theodore
7 declaration.

8 THE COURT: Whose declaration?

9 MR. THEODORE: The Theodore declaration, Your Honor.

10 So let's go to -- so if we go down to the first
11 e-mail in the chain, all the way down to the bottom. So this
12 is an e-mail from one of Cox's customer service
13 representatives. And she sends it to the Corporate Abuse
14 group. And what she says is: When a customer is terminated
15 for the first time, do we need your okay to turn them back on,
16 or do we make the call?

17 So let's go up to the next e-mail. And the next
18 e-mail is the response from Jason Zabek, who is their manager
19 of Abuse Operations. He is the guy in charge of this. And
20 here is what it says: If it is for DMCA, you can go ahead and
21 reactivate. Any other issues, we can all look at it together.

22 And then let's go up to the top e-mail in this chain.
23 Let me read it to you, Your Honor. What it says is in 99 --
24 oh, here we go. So if we blow up the top e-mail in this chain,
25 this is another e-mail from a customer service representative.

1 So these are the people who are actually dealing with the
2 subscribers. They're actually implementing the policy.

3 And what she says: In 99 percent of the cases, we
4 are going to turn the customer back on.

5 And then she says: In 1 percent of the cases the
6 customer will not reactivate at their own discretion.

7 So as a matter of policy, it is Cox's policy to turn
8 these people back on when they want to be turned back on. The
9 1 percent who don't get turned back on, it's because they don't
10 ask. It's because they don't ask.

11 Let's look at Exhibit 22. Let's go again down to the
12 bottom, to the first e-mail. So this is an e-mail from Roger
13 Vredenburg, another customer service representative: Third
14 termination, what should we do?

15 So Joseph Sikes, who is the senior lead abuse
16 engineer, Zabek's deputy, if we go up to the next e-mail, he is
17 going to respond. And he says -- if we go up one e-mail: What
18 would Jason Zabek do? I'm sure Jason would say reactivate.

19 And the next e-mail Jason Zabek actually speaks. And
20 what does he say? DMCA equals reactivate.

21 That's their policy for this period, DMCA equals
22 reactivate.

23 Then at the top he says: You can make them wait a
24 day or so if you want, with a little wink.

25 That's their policy, Your Honor. And here we're

1 talking about customers who Cox itself, Cox itself deemed them
2 appropriate to terminate. Cox decided, these are the ones we
3 should terminate, and then it turned them back on promptly
4 because it wanted to keep them as subscribers.

5 Now, that's not termination for purposes of the DMCA.
6 That's not a real termination. That just doesn't -- they don't
7 cite a single case -- in fact, they don't really even argue in
8 their brief that turning customers off for a day and turning
9 them back on constitutes terminations. That is not a
10 termination policy.

11 So why did they do this? Let's look at exhibit --
12 let's look at Exhibit 46.

13 THE COURT: The same declaration?

14 MR. THEODORE: Yes, this is all to the Theodore
15 declaration, Your Honor. Let's look at the second e-mail from
16 the top. This is an e-mail from Jason Zabek. Why do they
17 perform this charade? They say: Remember that we must
18 terminate to receive protection under the safe harbor
19 amendment.

20 So what they're trying to do here is to mark people
21 down as terminated, go into court and claim, represent that
22 they've terminated them so that they can claim a DMCA defense,
23 but actually turn them right back on to retain the revenue.

24 So let's see what Joseph Sikes says in response. So
25 after Mr. Zabek has said, we need to terminate to receive

1 protection under the safe harbor, yep, right, sure, we do, but
2 I don't believe TOC is actually terminating the service. They
3 are just clicking "terminate" and "update ticket," which shows
4 a termination in the customer's ticket history.

5 Just updating the ticket, not actually terminating.
6 That's not a termination policy.

7 And Cox doesn't really dispute this. So Cox doesn't
8 point to any subscribers during the time period from when
9 Rightscorp started sending notices on behalf of the plaintiffs
10 to December 2012 where they actually terminated someone and
11 didn't reactivate. It's Cox's burden, it's Cox's burden to
12 show the safe harbor here, Your Honor.

13 They don't come forward with a single subscriber in
14 the first three quarters of 2012 who they terminated without
15 reactivating. That is just not a termination policy during
16 this period.

17 Moreover, they don't even really deny it. If you
18 look at their declarations closely, what you will see is a
19 discussion of this in the present tense. All of their -- all
20 of the language in their declarations, terminations is
21 terminations, present tense.

22 But let's look at what their employees actually said
23 about this at the time. Let's look at Theodore Exhibit 52.

24 Let's go -- I think this is just one e-mail: DMCA
25 terms are not really terminations. They acknowledge this

1 internally. DMCA terms are not really terminations.

2 So they marked them down as terminations so they
3 could represent in court that they were terminations, but even
4 they acknowledge themselves they are not really terminations.

5 So I'll let Mr. Bridges put forward the evidence he
6 wants to, but I think the undisputed evidence here, that there
7 is no genuine dispute of material fact as to the critical -- a
8 critical point. They did not terminate during this period.
9 And without terminations, with a policy of not to terminate, at
10 least during that period, they cannot satisfy the DMCA safe
11 harbor.

12 So let's talk about the period after the Fall of
13 2012, from the Fall of 2012 to present. So Cox didn't
14 terminate in that period either. Let's look at slide 1.

15 So what this shows, Your Honor, this shows by month
16 the number of terminations that Cox performed or claimed to
17 perform from 2012 through the last month for which they gave us
18 data. And these numbers are straight from their interrogatory
19 responses. And the numbers on the left are individual numbers
20 of terminations. These are individual subscribers, 1, 2, 3, 4.

21 So from January through August 2012 -- or these are
22 all fakes terminations. But they are claiming to terminate
23 six, seven, eight, once as high as 12 subscribers a month.

24 Then suddenly when they changed their policy, when
25 they stopped this fake termination business, look what happens.

1 Suddenly zero, one, one, zero, zero, zero. I mean, the
2 terminations essentially disappear.

3 And we'll talk in a second about what these 22
4 alleged terminations actually mean, but here is how they
5 accomplish this. First, they decided that they weren't going
6 to even consider a subscriber, not even consider a subscriber
7 for termination until they were the subject of 14 infringement
8 notices within a six-month period. 14 notices within a
9 six-month period is Cox's minimum for a repeat infringer.

10 Now, I think we can have a debate about two, three,
11 four, but there is no authority whatsoever to suggest that 14
12 is a reasonable baseline.

13 THE COURT: There is no definition of what is
14 reasonable and what is unreasonable, right?

15 MR. THEODORE: That's true, but if you look at the
16 legislative history, Your Honor, the legislative history, the
17 Conference Report suggests, I think this is page 75 of the
18 Conference Report, that more than two infringements within a
19 three-year period is a pattern of infringement.

20 THE COURT: I am not going to look at that stuff.
21 There is 18 different people who said 18 different things about
22 it, and that's why legislative history is so unhelpful, it's
23 because people talk about lots of things.

24 What are the words of the statute? And the lack of
25 definition here is troubling because it allows interpretation

1 by the company as long as they have a policy and they implement
2 the policy, then I think it's a jury question as to whether
3 it's a reasonable policy. Whether 200 soft hits or 500 hard
4 hits are sufficient. I think that because of that lack of
5 precision, you get into issues where a jury is necessary.

6 So let's not look at that legislative report.

7 MR. THEODORE: Fair enough, Your Honor.

8 THE COURT: So here we have very few terminations.

9 MR. THEODORE: We have very few terminations. And
10 what we have are many, many, many instances where Cox knows,
11 knows, knows and acknowledges, and even has its subscribers
12 acknowledge to Cox that they are repeat infringers, and Cox
13 still doesn't terminate.

14 THE COURT: Does BMG have evidence of other ISPs and
15 their policies that on termination of those -- like Verizon? I
16 mean, I'm just curious, I don't know what your evidence is
17 going to be down the road, but is there evidence of what other
18 ISPs -- how they have defined the number of violations
19 sufficient to cause termination?

20 MR. THEODORE: I don't think that we are relying on
21 evidence of other ISPs. I mean, I don't want to prejudice us
22 for trial, but let me say for purposes of this motion --

23 THE COURT: Right. The evidence is closed, so I know
24 you may or may not use it, I'm just curious as to --

25 MR. THEODORE: For purposes of this motion, we are

1 not relying on comparisons to other ISPs.

2 THE COURT: I understood that. It was a question
3 outside of what I have read getting ready for -- as I said, I
4 was just curious about it. So ahead, I'm sorry.

5 MR. THEODORE: No, I understand, Your Honor. But
6 cases -- courts who have dealt with this have held that
7 whatever -- 512(i), as you say, Your Honor, it's not the
8 clearest statute. But the Cybernet Ventures case, the Hot File
9 case, the Escape Media case, the common thread of every single
10 one of those cases is that when you know of a repeat infringer
11 and you do nothing, when you fail to terminate known and
12 acknowledged repeat infringers, that puts you outside the safe
13 harbor.

14 And here there is no genuine dispute of fact that Cox
15 knew that some of its subscribers were infringing and failed to
16 terminate them. So let's look at the e-mails that show this.

17 Let's look at Theodore Exhibit 47. And let's go down
18 to the first e-mail. So this is termination review, Your
19 Honor. So we talked about the 14 steps. After 14 steps,
20 everyone is considered for termination.

21 So here this subscriber is being considered for
22 termination. And the subscriber is well aware of his actions.
23 He is upset that, quote -- this is a Cox customer service
24 representative quoting the subscriber: Upset that after years
25 of doing this, he is now getting caught. After years of doing

1 this.

2 What does Cox do? Let's go up to the top e-mail on
3 this chain: Please advise this customer that this is their
4 final suspension and reactivation.

5 So Cox doesn't terminate him. And the evidence shows
6 that this, we'll terminate them next time, this is their last
7 chance, that's a sham.

8 Let's look at Exhibit 6 to the Roberts declaration,
9 that is docket 346. I'm sorry, 436. That is docket 436.

10 So here we have a subscriber who has been told
11 multiple times to secure his open wireless router. By the way,
12 this is a good point about the wireless. By the time people
13 are getting to the termination stage here, they have had six
14 conversations with Cox abuse personnel who have told them to
15 put a password on their WiFi router. We're not talking about
16 people sharing or WiFi poaching here, Your Honor. They have
17 been told to secure their WiFi over and over. He also been
18 warned that the next complaint can result in termination of
19 service.

20 All right. So what does Joseph Sikes say, the senior
21 lead abuse engineer? Yep, this is their absolute last chance.
22 Next complaint equals six months termination.

23 So this is March 4. Note, March 4. And I want you
24 to note the CATS ticket ID number, 18198022.

25 Let's go to Exhibit 5 to docket 436, this is to the

1 Roberts declaration. Let's go to the bottom e-mail, all the
2 way down. All the way to the bottom of this. Couple pages
3 more. Let's keep going. Here we go. So let's highlight this
4 bottom e-mail.

5 So first of all, last ticket, 18198022, talking about
6 the same customer. Now they're on the next ticket, it's three
7 weeks later: Customer was warned that further complaints would
8 result in termination. We have received an additional
9 complaint.

10 So what happens? Let's go up to the next e-mail.
11 All right. So this is an e-mail from Joseph Sikes. And he
12 says: This customer pays us over 400 a month. And if we
13 terminate their Internet service, they will likely cancel the
14 rest of their services.

15 Now, Cox accuses us of failing to quote the last line
16 of this e-mail: If all of this has been covered in detail,
17 then please go ahead and terminate their Internet service for
18 this complaint.

19 Cox complains we don't quote that last line. But
20 let's go to the top of this chain. Let's blow up that top
21 e-mail. What happens? Please suspend this customer one last
22 time.

23 So, I mean, this is now the third time that Cox has
24 said, we're going to suspend this customer one last time. And
25 in fact, according to the records that Cox has provided to us,

1 this customer was never terminated, never terminated.

2 Let's look at another e-mail. Theodore Exhibit 49.
3 If we go to the bottom e-mail on this chain. Third time to the
4 404 number. The 404 number is the number for their technical
5 operations center in Atlanta. That means they've talked to the
6 top tier customer services reps about this now three times: He
7 was warned on the last call that the next offense would result
8 in termination review.

9 Let's go up to the top e-mail. The customer knows
10 it's his fault. There is no question here, Your Honor, that
11 this customer is the one infringing, repeatedly infringing.
12 What do they do? They don't terminate him. And according to
13 their records, he was never terminated.

14 We can keep going with these e-mails, Your Honor, but
15 we have limited time, so I won't bore you. But the bottom line
16 is that over and over and over Cox received notice of repeat
17 infringement by its subscribers. Their subscribers
18 acknowledged that they were repeat infringers, and Cox didn't
19 terminate them.

20 Let's put up slide 2. Let's just put up all three
21 bars. So 6.5 million, that's the number of notices that Cox
22 received, excluding every single Rightscorp notice. We're
23 going to put aside all the Rightscorp notices that they don't
24 like because they have settlement offers. Excluding every
25 single one of these, Cox got 6.5 million notices of

1 infringement. It issued 711,000 warnings and suspensions.

2 Now, because Cox holds the first complaint for more,
3 that means every single one of those warnings and suspensions
4 was a notice of infringement that Cox deemed acceptable and
5 that was the second or greater notice of infringement within
6 six months.

7 How many people does Cox claim to have terminated?
8 22. Cox claims to have terminated 22 of these repeat
9 infringers. And in fact, Cox admits that of those 22 -- and it
10 is actually 21, they miscounted them, but we will use 22 that
11 was in their rog response, we will use it. But if you look at
12 their actual evidence, which is Exhibit 55 to the Theodore
13 declaration, it's 21. Of those 21 or 22, Cox admits that at
14 least, this is their response to SUMF 68, Cox admits that at
15 least 17 of those either had failed to pay their bills on time
16 or were excessive band width users.

17 So really what's happening here is that Cox knows of
18 repeat infringers, but it's not terminating repeat infringers
19 for repeat infringement. It's terminating them when it's
20 convenient to Cox.

21 And whatever the intent of the statute, it's not
22 that. The statute is not designed to allow Cox to terminate
23 repeat infringers when they're a financial burden on Cox. Cox
24 needs to terminate repeat infringers when they repeat infringe
25 copyright. And Cox just is not doing that.

1 And there are multiple cases, Your Honor, holding
2 that a repeat infringement policy is not adequate as a matter
3 of law where it is undisputed that, as it realistically is
4 here, there is not a genuine dispute that Cox has failed to
5 terminate known repeat infringers. And when it fails to do
6 that, it takes itself out of the safe harbor.

7 As the ALS Scan case out of the Fourth Circuit said,
8 the safe harbor is for innocent, innocent service providers.
9 And that innocence disappears when you learn of infringement
10 and you do nothing.

11 That's what we have here. Cox knew of infringement.
12 It did nothing. That as a matter of law takes it outside of
13 the DMCA safe harbor.

14 THE COURT: Okay. Thank you.

15 Mr. Bridges.

16 MR. BRIDGES: Thank you, Your Honor. Evidence of
17 actual terminations, I would point the Court to Linda Trickey's
18 declaration on the summary judgment motion, paragraph 17. The
19 Beck declaration opposing the plaintiffs' motion, Exhibit A.
20 Even Exhibit 55 of Mr. Theodore's declaration.

21 I actually commend to the Court, and they have picked
22 what they have found to be -- they think to be the most
23 inflammatory e-mails, it's actually worthwhile reading the full
24 e-mails and seeing the discussions that are going on.

25 There is a reluctance to terminate. There is an

1 effort to work with people. It's, let's try to get them to
2 shape up. And there is an effort. And there is evidence that
3 people do shape up. And that is why Cox works so hard with
4 them.

5 Your Honor asked about other ISPs. And actually
6 that's one of the things we use the Rosenblatt declaration
7 about.

8 THE COURT: Yeah, but he doesn't know. He's familiar
9 with the policies, and he thinks this and he thinks that, but
10 you need third-party people who are working at those entities
11 to have personal information. And he doesn't have the personal
12 information.

13 MR. BRIDGES: But he did draw upon the published
14 statements --

15 THE COURT: Yeah.

16 MR. BRIDGES: AT&T, Your Honor --

17 THE COURT: Well, if you drew upon the public
18 statements that Cox made, you would think that they had a
19 wonderful policy and that they had a very structured review of
20 when terminations would occur. And the numbers belie that. So
21 that's why it's of marginal use.

22 MR. BRIDGES: So there is I think some other
23 information. We do know that AT&T -- I am pretty sure, AT&T
24 actually requires an adjudication.

25 Verizon didn't terminate anybody, I believe, until

1 2012. One of their e-mails that they tried to use against Cox
2 because it has a chimp on it, chimp number 6, it's discussing a
3 news article that says that Verizon has started terminating
4 people. And the evidence is that Cox has been terminating
5 people I think since at least 2004, if not earlier. There was
6 a tip in the numbers, but there are real terminations.

7 THE COURT: So that would be evidence if it's in the
8 record that you could present to a jury as to whether your
9 program was reasonable.

10 MR. BRIDGES: That's correct, Your Honor. One thing
11 though that I think is useful in looking at Rightscorp's
12 arguments here and its notices -- it's not an obligation. It
13 is a condition of the safe harbor, is to adopt, notify users
14 of, and reasonably implement a policy for the termination of
15 account holders and subscribers who are repeat infringers.

16 Now, I can't remember if it was Mr. Pecau or somebody
17 on the other side earlier said the law makes no difference
18 between subscribers and users. It absolutely does make a
19 difference in the text of section 512(i). It doesn't say:
20 Terminate subscribers where their accounts have been misused.
21 It said: Terminate subscribers or account holders who are
22 repeat infringers.

23 Now, the big question, and this is part of the
24 uncertainty that the Court has pointed to in the law, elsewhere
25 in section 512 there are references to claims of infringement.

1 Section 512(c), which is about a different type of safe harbor,
2 talks about notifications of claimed infringement. Other
3 places it talks about claims of infringement or allegations of
4 infringement.

5 Here it's not a policy to terminate persons alleged
6 to be infringers. And that's why David Nimmer in his early
7 article, which I guess AT&T is following, said it should be
8 adjudications.

9 THE COURT: But Cox read the statute and they
10 constructed their policy, and their policy dealt with accused
11 infringers.

12 MR. BRIDGES: Absolutely, Your Honor.

13 THE COURT: So it didn't require adjudication. And
14 it followed up by saying, we're going to do the following.
15 When we get the second notice, we'll do this. When we get the
16 eighth notice, we'll do this. When we get the 14th notice,
17 we'll do this.

18 So Cox has looked at the statutory requirements for
19 safe harbor and decided, this is what we are going to do.

20 MR. BRIDGES: Exactly, Your Honor, because Cox said,
21 we're going to do more than we think that the statute requires.
22 But they don't lose the safe harbor for failing to do as much
23 more than the safe harbor requires as they could.

24 THE COURT: The issue is, did they do what they said
25 they were going to do. Isn't that what BMG's proof is? You

1 didn't do what you said you were going to do.

2 MR. BRIDGES: Your Honor, I'm not sure that that's
3 the standard in section 512(i). The standard is to adopt a
4 policy. And the policy is to terminate people who violate the
5 acceptable use policy.

6 But I want to point out also, there is in the record,
7 and I think this is important, there are several letters from
8 other ISPs to the plaintiffs. And what's interesting is the
9 plaintiffs didn't care about these letters. The plaintiffs
10 just shot them right over to Rightscorp. The plaintiffs, BMG
11 and Round Hill, they weren't going to read these letters. And
12 these are letters from other ISPs explaining why Rightscorp's
13 notices are invalid.

14 Now, the point is, one of the problems that Cox faces
15 is it's not well-positioned to do adjudications of
16 infringement. So it has done its best. And I am confident,
17 Your Honor, that a jury will be able to look at these and make
18 its decision according to what it thinks the standard is under
19 the law.

20 And I think that the context and the explanations --
21 the interesting thing is that most inflammatory statement I
22 think Your Honor alluded to earlier, there is a famous F, there
23 is a famous F --

24 THE COURT: He's an engineer. You have got people on
25 top of him who are talking about the policy.

1 MR. BRIDGES: That's right.

2 THE COURT: But all of these e-mails that Theodore
3 references are damning. You know, I think you're going to get
4 crushed, frankly, in front of a jury. I mean, we've got smart
5 juries in this town, and they are going to look at this, and
6 you put your best foot forward, but I am not sure you are going
7 to have much success. But that's something that we'll deal
8 with down the road. But that's my personal assessment.

9 Let me ask you this. Cox gets the notices. They
10 include a demand for \$10 or \$20, and I'm not sure why the
11 difference. But they say, you know, we can resolve this, give
12 us 10 bucks. Cox says, we're not forwarding that kind of
13 information on, that's extortion. There has been no
14 adjudication, or for whatever reason we're not going to get in
15 bed with you, we don't think this is appropriate. No, we're
16 not willing to share the \$10 with you. Rightscorp, clean up
17 your act.

18 Why didn't Cox send the notices on anyway without the
19 letter?

20 MR. BRIDGES: Well, I think it would have to rewrite
21 the plaintiffs' notices, and I don't think that's a very good
22 practice for an ISP to do.

23 THE COURT: I mean, you're collecting information
24 from the letter so that you can identify the information in the
25 ticket, right?

1 MR. BRIDGES: That's right. But, Your Honor, this
2 process, which is called a graduated response process --
3 actually, I want to come back to this. I forgot part of my
4 answer earlier. If I can answer something earlier and then
5 come back.

6 The copyright alert system, which most of the major
7 ISPs use, it doesn't particularly fulfill this DMCA
8 requirement, but it's as a practical matter what most of them
9 use. It does not have any termination provision at all.

10 THE COURT: Yeah, but that's not binding on -- that's
11 a tool that is being used in the industry that is outside of
12 the requirements of the Act.

13 MR. BRIDGES: That's correct, Your Honor. You did
14 ask what other ISPs had done, and I wanted to mention that.

15 And then also, it may inform what in a broader scheme
16 is a reasonable implementation of a policy even if there is
17 something analogous that is not directly equal.

18 But to come back to this question, Your Honor. Part
19 of the difficulty was this was a business model by Rightscorp
20 to monetize the threat of loss of Internet service. And it
21 starts out by saying: Your ISP has forwarded you this notice.
22 You may lose your Internet service.

23 Cox felt that it was being drawn into an extortion
24 scheme that it did not want to be a part of.

25 THE COURT: I understand that. I think I just said

1 that. And that's a decision they made.

2 My question was, why didn't they modify it and at
3 least send the notice on so that, one, you're covered by the
4 safe harbor provision, which requires you to forward this
5 information on; and two, so that the subscriber understands
6 that he is at risk for losing his ISP?

7 MR. BRIDGES: Well, Your Honor, the question is
8 interesting because Cox was asking Rightscorp to change the
9 notices. In testimony -- I took the depositions of the
10 plaintiffs, and they said they wouldn't want the changes.

11 THE COURT: And I understand. And that's on them.

12 MR. BRIDGES: Right.

13 THE COURT: I mean, Rightscorp refusing to change the
14 provision, that's an affirmative decision they made that I
15 don't think a jury is going to like. And it may turn out to be
16 a very reasonable reaction by Cox to this demand. And they may
17 just -- they may think that, well, I would have done the same
18 thing.

19 My question was, why didn't Cox at least send the
20 notification on?

21 MR. BRIDGES: Well, if it were to -- you mean
22 changing it or not changing it?

23 THE COURT: Changed.

24 MR. BRIDGES: Changing. One it changes --

25 THE COURT: Eliminate the whole request for money.

1 MR. BRIDGES: So if there is illegal conduct or if
2 there is skulduggery here or a risk of it, if Cox materially
3 changes the notice, it loses the protection under section
4 230(d) of the Communications Decency Act and makes Cox the
5 author of that notice now instead of Rightscorp.

6 Rightscorp is the author of that notice, and Cox
7 should not be getting in and messing with it. The easy answer,
8 Your Honor, is that Rightscorp could fix it. And they kept
9 asking. And plaintiffs knew about this. Rightscorp was all
10 over this. This was the business model.

11 And the other thing is, these were demands being made
12 of account holders regardless of responsibility. And there is
13 an established path in the law. And the established path in
14 the law, as we see in Hard Drive Productions here in Virginia,
15 is if you want to go after somebody, you bring the John Doe
16 lawsuit and you actually find the perpetrator.

17 I will sit down now, Your Honor, except there is one
18 point I would like to make. The Court addressed the direct
19 infringement underlying prerequisite for secondary liability,
20 and then we've been addressing the DMCA. What we have not yet
21 addressed are the substantive standards for contributory
22 infringement and vicarious liability, and I do hope to have the
23 opportunity to do that, Your Honor.

24 THE COURT: And I will give you that in a minute.
25 Thank you, Mr. Bridges.

1 MR. BRIDGES: Thank you.

2 MR. THEODORE: Very brief response, Your Honor.

3 THE COURT: Yes, sir.

4 MR. THEODORE: What you didn't hear from Mr. Bridges
5 was anything about 2012, nothing about their reactivations.

6 Now, what you did hear from him, when you asked him,
7 what is your evidence of terminations, he pointed to the
8 Trickey declaration and the Beck declaration. That's just a
9 list of claimed terminations. Many of which were reactivated
10 and many of which may have been terminated for other reasons.
11 It is their burden to show their affirmative defense by coming
12 forward with evidence that they terminated in appropriate
13 circumstances.

14 They have given a list of numbers. That is what is
15 in the Trickey declaration and the Beck declaration, one, two,
16 three terminations a month. They haven't come forward with any
17 evidence to meet their burden to show that they terminated for
18 copyright infringement in appropriate circumstances.

19 And they admit that in 17 of those 21 or 22 instances
20 there were other non-copyright reasons. They have not met
21 their burden. They have not come forward with evidence to
22 create a genuine issue of material fact on the question of
23 their having a policy to terminate repeat infringers in
24 appropriate circumstances and to reasonably implement.

25 Now, one other point, Your Honor. Mr. Bridges talked

1 a lot about adjudications. That is simply not the law. There
2 is not a single case that has required adjudications in order
3 to overcome the DMCA safe harbor.

4 We cite a lot of cases that establish that red flag
5 knowledge and actual knowledge require an ISP to terminate in
6 order to preserve the safe harbor. And the reason for that,
7 Your Honor, is the reason for secondary liability. As Grokster
8 said, as Aimster said, as Judge Posner said in the Aimster case
9 out of the Seventh Circuit, the entire point of secondary
10 liability is so that you don't have to proceed against a
11 thousand or 100,000 or a million individual subscribers.

12 If they were entitled to a DMCA safe harbor unless we
13 got adjudications of infringement against every direct
14 infringer, there would be no point to secondary liability.

15 As the Fourth Circuit has said, an ISP loses its safe
16 harbor when it loses its innocence. Cox is not innocent.
17 Their e-mails make that abundantly clear. And you didn't hear
18 anything from Mr. Bridges to create a genuine dispute of
19 material fact on that point.

20 THE COURT: All right. Thank you.

21 MR. BRIDGES: I do need to respond briefly, Your
22 Honor.

23 THE COURT: Very briefly.

24 MR. BRIDGES: Because he invoked references to red
25 flags and knowledge.

1 THE COURT: Yes.

2 MR. BRIDGES: I think Mr. Theodore has badly confused
3 two very different safe harbors. There are four safe harbors.
4 And 512(a), which applies to conduit services like Cox, is
5 unique. It has only two conditions.

6 The other safe harbors have many more conditions that
7 a service provider must meet. The red flag and knowledge
8 criteria he just referred to are in 512(c), and they may be
9 in -- they are also in (d). I can't remember if it's in (b).

10 But I just want to say, we're not here talking about
11 512(c), and many of these cases are about 512(c).

12 So I just wanted to --

13 THE COURT: All right. Stay up.

14 MR. THEODORE: I'm sorry.

15 THE COURT: Stay up there. Talk about contributory
16 infringement.

17 MR. BRIDGES: Thank you. So, Your Honor,
18 contributory -- let me back up a bit and talk about both
19 contributory and vicarious because I think a lot of courts and
20 lawyers get confused about how they differ. And contributory
21 is about wrongful conduct, it's like aiding and abetting. And
22 vicarious doesn't have to be wrongful at all, it's just about a
23 special relationship.

24 So one is conduct based and culpability based, and
25 the other is special relationship based. And they have

1 different approaches and different ways of thinking about them.

2 Some cases -- frankly, I think the Fonovisa case in
3 the Ninth Circuit, they jumbled all the facts together so
4 people have confused sometimes contributory with vicarious, but
5 I think it is important to keep them separate.

6 The Supreme Court -- as you know, there is no statute
7 for either contributory or vicarious. So unlike the underlying
8 direct infringement which must be grounded in the statute, this
9 is all judge made.

10 And on contributory, the Supreme Court has spoken in
11 the Grokster case. And do we have the language in Grokster?
12 The bottom quote here is the summary: One infringes
13 contributorily by intentionally inducing or encouraging direct
14 infringement. That's the summary.

15 But the holding is: One who distributes a device, or
16 in this case provides a service, with the object of promoting
17 its use to infringe copyright, as shown by clear expression or
18 other affirmative steps taken to foster infringement, is liable
19 for the resulting acts of infringement by third parties.

20 Now, in fact this is the law of the land. And this
21 is a statement of contributory infringement liability, the
22 first and only clear statement by the Supreme Court. In the
23 Sony case back in 1984, the Supreme Court cited to Gershwin,
24 but it didn't rule on what the standard was the way Grokster
25 did.

1 And the plaintiffs have tried to say that courts have
2 not interpreted Grokster the way we have. And I think in fact
3 courts have. If you look at Perfect 10 versus Amazon.com in
4 the Ninth Circuit and Judge Posner's decision in Flava Works in
5 the Seventh Circuit, the courts are following this.

6 Judge Posner in Flava Works said that knowledge is
7 not enough. There must be encouragement. And Perfect 10
8 versus Amazon.com talked about when intent may be inferred.
9 And it said it can be inferred there from knowledge of actual
10 specific infringement coupled with a failure to take simple
11 measures.

12 And the fact is, in operating a general purpose
13 service like this, there are no simple measures. They can't do
14 deep packet inspection. They can't get in and alter the
15 service in a way that would help -- that would help avoid
16 infringement.

17 One important issue here is that there are two
18 different types of defendants and services at issue in the
19 various contributory cases. And the ones that have -- where
20 courts have ruled against the defendants are generally in what
21 I would call closed systems where the defendants are providing
22 the site and facilities intentionally for infringement. And
23 that would include Fonovisa where it was a flea market with
24 massive infringements and the sheriff always coming by and
25 people building an infringing site.

1 Napster speaks for itself. Aimster. These were
2 sites and operations that were really focused on infringement.

3 Cases that go the other way are more open systems.
4 Perfect 10 versus Amazon.com left it open that there could be
5 liability, but we're still dealing with a different thing.

6 So Cox isn't providing some service that is adapted
7 to infringement. It provides normal Internet service. There
8 is nothing different about what Cox provides the public from
9 what other ISPs provide the public.

10 THE COURT: What's your understanding of how BMG is
11 going to prove contributory infringement? Notice, right?
12 Notice that your systems were being used to contribute to
13 infringement.

14 MR. BRIDGES: Actually, Your Honor --

15 THE COURT: You knowingly allowed that to occur. I
16 mean, I think that's --

17 MR. BRIDGES: That's a legal argument, Your Honor.
18 But when we took the Grokster standard and put it in the
19 material facts in our brief, they admitted that they have no
20 evidence of an intent to induce or encourage infringement
21 through clear expression or other affirmative act.

22 They have admitted in their opposition that they
23 don't have facts that line up with the Grokster standard. And
24 that's the standard.

25 Now, they go back to earlier pre-Grokster cases and

1 try to argue knowledge, but they can't actually show actual
2 specific knowledge because of all the problems with notices and
3 things like that. And so, they invoke as their end run around
4 knowledge a concept of willful blindness. That's their
5 argument.

6 Now, willful blindness is a controversial topic, but
7 I want to go to the Supreme Court in its recent willful
8 blindness case involving patent inducement. And what was clear
9 from the Supreme Court there -- and I do think there are
10 differences between patent and copyright here even though the
11 Supreme Court keeps borrowing from patent for copyright.

12 In the Global Tech case, Your Honor, willful
13 blindness required active steps not to know and a deliberate
14 effort to shield one's self. It's not recklessness. It's not
15 negligence. It's not mere knowledge. And they don't have
16 enough to make the standard of willful blindness here.

17 Let me go through a number of points. Number one,
18 these notices were not notices of actual specific infringement.
19 These were notices of, well, something bad is happening there.
20 That is not good enough.

21 And they weren't notices that particularly identified
22 the --

23 THE COURT: So they said, IP account Joe Blow, you're
24 using this music and it's copyrighted and you haven't paid for
25 it. What more do they have to do?

1 MR. BRIDGES: They need to say -- well, using music,
2 Your Honor, I don't know what violates.

3 THE COURT: Well, they accused them of infringing the
4 copyrighted work.

5 MR. BRIDGES: Right. And they said that it was by
6 download, upload, or offer to upload. Which goes right back to
7 what is an offer to upload. Because that could be like a
8 landlord saying to somebody, I am terminating your lease
9 because you have violated the lease because you have not paid
10 rent, or you have damaged the property, or you cooked spaghetti
11 on Sunday.

12 Well, that last bit isn't a violation of the lease.
13 And that might be a termination notice with two valid reasons,
14 but it's vague as to what the actual act was because copyright
15 infringement is not a state of mind, it requires an action, and
16 they didn't identify action.

17 THE COURT: But it's notice, right?

18 MR. BRIDGES: No, Your Honor, it's knowledge. Notice
19 is a concept under the safe harbor under section 512(a). And
20 there are a number of cases that say that notices do not
21 necessarily equal knowledge. Knowledge is very different.

22 That's why in 512(c) there is an obligation to act on
23 notices. And if you act on notices, then you have met one of
24 your many conditions. But the knowledge issue is a separate
25 issue.

1 THE COURT: Well, then we go back to the 512(a) and
2 the fact that Cox chose to go forward with the 512(i)
3 identification and implement its policy. And maybe I've got
4 the subsection wrong. But let's finish up your argument.

5 MR. BRIDGES: The other thing is -- and we need to --
6 we may need to go to Judge Anderson's order. Actually, before
7 I get there, the question is what could Cox do about anything?
8 It could do things only with respect to its account holders.
9 And it never got knowledge that its account holders were the
10 people violating copyright law.

11 And they had opportunity, they could use the existing
12 channels. So they didn't learn anything about copyright, about
13 account holders.

14 Now, there is another problem here. And this goes to
15 some spoliation issues here. At some point -- well, it's how
16 Rightscorp itself defined an infringement. It defined an
17 infringement as an observation of a report from a bit torrent
18 client software, software client about how much of a bit
19 torrent payload, sort of contents, it possessed. And it didn't
20 actually, before it sent a notice, it didn't actually download
21 anything. It never did. It would just look to see what the
22 bit field said.

23 And at some point Rightscorp went from looking at the
24 whole bit field to see what the whole torrent package was to
25 looking for only 10 percent. Which meant it couldn't verify

1 whether the person they accused of even possessing this music
2 had the music because 10 percent makes it impossible.

3 And they changed that software and destroyed the old
4 software. And Judge Anderson found this to be an intentional
5 destruction and it was not lost through inadvertence or
6 mistake. And he explained that the accuracy of Rightscorp's
7 system is essential to the proof here, and it's gone. And he
8 said that the deposition testimony can't make up for it.

9 And so, we have a situation where these notices were
10 generated by a system that nobody can truly examine. And these
11 notices didn't ever result from a download. They resulted from
12 an observation.

13 And then let me say one other thing about these
14 notices. For a while they were going and hitting somebody out
15 there on the Cox network multiple times per day. And if they
16 saw part of a payload, if they knew or if they thought that a
17 payload was there and that payload might have 50 songs, then
18 they chalked that down as 50 infringements and sent 50 notices.

19 If they went back later that day and saw the same 50
20 songs there, it was another 50 notices.

21 And early on they were pounding the same Internet
22 piers many times a day. Later they claimed to have trimmed it
23 down to one time a day.

24 Well, Your Honor, A, there is no competent evidence
25 as to what was in that payload at the time of the observation

1 because of the spoliation of the software. So we don't know.
2 They don't know what was there.

3 Now, if they don't know what was there, how is Cox
4 chargeable with knowledge that these are actual infringements?

5 THE COURT: When did the last -- I mean, they kept
6 writing over the software, I understand that. When was the
7 last time that they wrote over the software -- asked
8 inartfully.

9 When did records begin to be kept as to the rewriting
10 of the software that Rightscorp was using that Judge Anderson
11 heard all the evidence about? Sometime in 2012?

12 MR. BRIDGES: No, I think it's 2015. I think that's
13 what we've got, Your Honor, July 2015. Am I correct there?

14 Right. We know how the Rightscorp system operated as
15 of July 15, 2015. Seven, eight, nine months into this lawsuit.
16 And we don't know beforehand.

17 And they want to say, oh, trust us, it worked the
18 way -- you know, their position, their benefit. So we don't
19 know that at all.

20 And the other thing is, it goes back, their whole
21 premise of sending notices rests upon their undefined "making
22 available" theory. Because they weren't actually testing
23 whether somebody was sending something to them. They were
24 merely testing whether it was available.

25 THE COURT: We're spilling over into other arguments.

1 We started out with the contributory/vicarious liability
2 argument, and I think --

3 MR. BRIDGES: And I mention that because of
4 knowledge.

5 THE COURT: And I think that --

6 MR. BRIDGES: Okay. So let me go to vicarious then.

7 THE COURT: Let's finish up. I'm sitting here with a
8 fever and --

9 MR. BRIDGES: Oh, I'm sorry, Your Honor. Okay, I
10 will go quickly.

11 THE COURT: I feel terrible.

12 MR. BRIDGES: I will go quickly. Vicarious, it's
13 when an obvious and direct financial interest in --

14 THE COURT: I understand the definition. My
15 goodness, Mr. Bridges, let's not go back -- this is not a law
16 school class.

17 MR. BRIDGES: Your Honor, that's fine. I will say, I
18 think that the Nelson-Salabes case and the Humphreys case in
19 the Fourth Circuit provide very good guidance here. It's a
20 relationship-based liability.

21 And Cox's relationship with its customers is not a
22 relationship that deserves vicarious liability. If they want
23 to argue that Cox's bad behavior justifies it under
24 contributory, that's a separate argument.

25 And with that, I will sit down, Your Honor.

1 THE COURT: Thank you, sir.

2 MR. BRIDGES: Thank you.

3 THE COURT: All right.

4 MR. PECAU: Your Honor, I'll be as quick as I
5 possibly can be.

6 THE COURT: Say what you have to say, until I stop
7 you.

8 MR. PECAU: All right. First of all, Your Honor, Cox
9 just gets Grokster wrong. I mean, that isn't what Grokster
10 held. It didn't change the common law definition and test for
11 contributory negligence. All Grokster decided was that if you
12 have a case like Sony, and even without having direct knowledge
13 of infringement, if you can show that there was inducement, you
14 don't have to show direct knowledge, you have a claim. That's
15 all Grokster said.

16 But what Grokster did say, it actually reaffirmed the
17 traditional principles of secondary liability and that they
18 continue to apply. And they cited Gershwin, and they cited
19 Shapiro versus Green. And they said, you know, that's the law
20 of the land and that's what we have to follow.

21 So what is that? So contributory infringement, two
22 things. One, you have to show knowledge. And two, that the
23 person actively induces, causes, or materially contributes to
24 the infringing conduct of another, is also liable for
25 infringement.

1 We have plenty of Fourth Circuit cases in this
2 district saying that's the law. Okay.

3 So what does Cox do? It claims that it doesn't have
4 knowledge of the infringement by its subscribers of plaintiffs'
5 works. But 1.8 million notices of infringement of specific
6 works by specific Cox subscribers identified by their IP
7 address and port number is evidence that Cox knew or had reason
8 to know of those infringements.

9 And there are cases, like the Ellison case, that say
10 the notices themselves establish, or at the very least are
11 actual notice -- or at the very least give actual notice or
12 reason to know or constructive knowledge. That's something for
13 a jury to find. And that's what the Ellison case said.

14 Further, you know, Cox says that it refused to accept
15 these notices -- I mean, Cox's refusal to accept these notices
16 is classic willful blindness.

17 Now, Cox comes up with an excuse, well, we didn't
18 know, you know, whether it's uploading, downloading, or making
19 available. So how could we possibly know?

20 Well, first of all, they're sophisticated. They know
21 if you're engaging in bit torrent, you're uploading, you're
22 downloading, and you're making available. You're doing all
23 three things. I mean, they knew that.

24 The fact is, this is traditional, classical willful
25 blindness. And if they have excuses, you know, well, we

1 weren't really willfully blind, we had a reason not to accept
2 these things, as Your Honor pointed out, that's for a jury to
3 decide. It's not a matter for summary judgment.

4 The second thing is that Cox materially contributed
5 to the infringement, providing the site and facilities by which
6 the subscribers accessed and shared infringing content. In the
7 Fonovisa case, the Napster case, the Capital Records case all
8 say that.

9 Now, Cox tries to distinguish these things by saying,
10 well, you know, it isn't like the Amazon case. Right? I mean,
11 the Amazon case -- you know, the reason that they didn't find
12 that there was a contributory infringement, because there they
13 weren't providing access. I mean, all it was was a search
14 engine.

15 And also in the Visa case, they weren't providing
16 access. All they were doing is allowing them to pay for the
17 bills. That isn't the same thing. Completely distinguishable.

18 The other thing is that the material contribution
19 that a jury would certainly be interested in is the fact, as
20 Mr. Theodore pointed out, certainly up through 2012, is that
21 Cox knew about infringers, and they pretended to terminate
22 them. And they actually reinstituted the next day or two what
23 they knew were known infringers.

24 If that isn't enabling infringement, I don't know
25 what is.

1 Okay. So let's just quickly go to Cox's vicarious
2 liability. Again, Cox is trying to make new law, but actually
3 it's trying to make law that is over 50 years old. I mean, the
4 fact is that Gershwin and Shapiro, Bernstein, and even the
5 Court in Grokster said that, you know, vicarious liability
6 doesn't anymore depend on respondeat superior.

7 What you have to do is you have to prove two things
8 if you're a plaintiff. You have to prove that a person, the
9 defendant has a right and ability to supervise the infringing
10 activity and has a direct financial interest in such
11 activities.

12 In other words, as the Court in Grokster stated, one
13 infringes vicariously by profiting from direct infringement
14 while declining to exercise a right to limit it.

15 Now, there is no doubt in this case that Cox had the
16 right to control this behavior under its acceptable use policy,
17 and it had the ability to control this behavior. The fact is
18 that it had the right and the ability and didn't do it, and
19 that's why we're here, Your Honor.

20 Now, the parties appear to agree that if the ability
21 to conduct the direct infringing activities enhances the
22 attractiveness of the site, or acts as some sort of draw to the
23 service provider, then the direct financial benefit is
24 satisfied.

25 And, you know, the plaintiffs argue that the jury

1 could find that the access to free illegal music acts is a draw
2 to Cox's service. And there is a lot of evidence that will
3 show this, Your Honor. Fully 16 percent of the Cox users admit
4 to downloading or uploading music through sites such as Pirate
5 Bay, Kickass Torrents, and Torrents.

6 The evidence also -- the evidence also shows that
7 when these persons were asked, you know, the people that were
8 uploading and downloading this stuff --

9 THE COURT: Was that a survey? How did that
10 16 percent -- who did that?

11 MR. PECAU: Okay. Right. That was Dr. Nowlis, who
12 is a well-respected professor who does these survey things.
13 And what he did is he went out to Cox subscribers and he asked
14 them a series of questions. And one of them --

15 THE COURT: Yeah, I remember now.

16 MR. PECAU: So what are you doing? So are you
17 uploading and downloading? Yeah, 16 percent said that.

18 So then he asked that 16 percent, you know, trying to
19 find out whether it's a draw, he asked them, you know -- and he
20 had a list of things that he was moving around. But one of the
21 things he asked them, he asked them, he said, you know -- he
22 asked them, is it -- you know, tell us the reasons that you
23 subscribe to Cox.

24 And one of the reasons is the ability to download or
25 upload free music through sites such as Pirate Bay, Kickass

1 Torrents, and Torrents. All right.

2 And 70 percent of the respondents, and that is
3 70 percent of 16 percent, said, yeah, that's why we do it. And
4 that is fully 10 percent of all Cox subscribers saying that a
5 reason that they subscribe to Cox is because they could get
6 this free music.

7 Your Honor, this makes a lot of sense when you think
8 about it. I mean, the Cox subscribers really aren't getting
9 free music because they have to pay Cox a lot of money to get
10 free music, supposedly free music, just the same way you pay
11 large money for this --

12 THE COURT: Does BMG have to show that Cox knew that
13 its subscribers getting this 16 percent, or that 70 percent of
14 that 16 percent were downloading free music and that's why they
15 subscribed?

16 MR. PECAU: Well, Your Honor, first of all, we could
17 show that because, as Mr. Theodore pointed out, that even when
18 they were looking at, you know, whether they should terminate
19 somebody, they said, you know, this guy is paying us a lot of
20 money, we don't want to terminate him.

21 So they realized that they were getting a lot of
22 money from them. In fact, the incremental profit from these
23 people is 97 percent.

24 But, Your Honor, I just want to make the point when
25 you think about it, what Cox provides. If you think of their

1 cable service, what do they provide? They provide things like
2 ESPN, but they pay a lot of money for ESPN. Right?

3 But here, this is a great thing for them because what
4 peer-to-peer -- what this BitTorrent does is that they get a
5 large number of people coming to their service who can get
6 music, quote free music. And that's a complete bonus to Cox.
7 They continue have to pay for that content.

8 So they are definitely getting a direct financial
9 benefit from it. And, you know, this is something that, you
10 know, a jury is going to figure out. It's perfectly what a
11 jury decides, is whether they are getting a direct financial
12 benefit.

13 We think that the evidence is absolutely clear, but
14 it's something that ultimately should be decided by a jury.

15 Thank you, Your Honor.

16 THE COURT: All right, thank you.

17 All right. Mr. Bridges, I will give you the last
18 word.

19 MR. BRIDGES: I will go very briefly, Your Honor,
20 because I am conscious of the Court's condition.

21 A couple of things. If one looks at -- I am not
22 trying to make new law. I'm trying to keep the law on the
23 tracks, Your Honor. And I'm trying to explicate it and why
24 vicarious is different from contributory in a way to assist the
25 Court. And there are two different strands.

1 The cases that -- if you go through the major cases,
2 what types of relationships were there? Shapiro, Bernstein, it
3 was a department store with an outsourced department that was
4 selling bootleg records.

5 In the Fourth Circuit, the Nelson-Salabes case and
6 the Humphreys cases, these were owners of entities or owners of
7 projects where there were infringing architectural projects
8 being built. Financial interest and heavy involvement.

9 The Gershwin case is the paradigmatic with Shapiro,
10 Bernstein, the paradigmatic case. What happened in Gershwin?
11 The defendant, who is an empresario company, it was Colombia
12 Artists Management, it managed artists, it directed them, it
13 created the audiences where the infringements would occur.
14 They were not employees. It doesn't have to be respondeat
15 superior, but it has to be some kind of relationship-based
16 liability.

17 And the Second Circuit in Gershwin said, if you're
18 creating the audience, if you are directing what's going on,
19 you're going to be vicariously liable. All this stands to
20 reason.

21 The Ellison case is an important case. AOL in that
22 case lost the safe harbor because of an e-mail mix-up --

23 THE COURT: Do you agree that this is something a
24 jury is going to decide after we properly instruct them?

25 MR. BRIDGES: No.

1 THE COURT: And that the fight here is over what the
2 proper instruction is?

3 MR. BRIDGES: No, Your Honor, because this is a legal
4 concept of whether this relationship qualifies for vicarious
5 liability. That's a pure legal question.

6 And, no, it's not just respondeat superior. You
7 know, a partner can be responsible for another partner.
8 Alterego is responsible. Parent/child. Employer/employee.
9 There are lots of different ways.

10 What happened in Shapiro, Bernstein, which courts
11 have respected, is they said, what are the hallmarks of a
12 relationship that qualifies for vicarious liability? And they
13 identified the hallmarks as an obvious and direct financial
14 interest in the infringement, coupled with a right and ability
15 to supervise. Because that is sort of how employer/employee
16 is, but it's not limited to that. But we have to look at that
17 as a way of saying -- how do we separate this type of
18 relationship that should be liable from, for example, a
19 landlord/tenant that shouldn't be liable.

20 And the Fonovisa case was an interesting case because
21 it was not really landlord/tenant even though it was flea
22 market and vendor because there was much more interaction
23 between them where the defendant was sort of creating that
24 market.

25 So that's what's involved here. And the Ellison case

1 is great on the direct financial benefit.

2 The Wolk case is an excellent one, that's a District
3 Court though. I have been trying to give you as many circuit
4 courts as possible. But Wolk said that there has to be direct
5 financial benefit from infringement, not a direct financial
6 benefit just from offering the service.

7 Now, Ellison introduced the concept of what acts as a
8 draw. But Ellison couched it in terms of a causal relationship
9 between infringement and the financial benefit. And it
10 specifically said that ordinary fees, flat fees and the like,
11 don't qualify. And they have shown no special financial
12 benefit here from infringement.

13 Now, I want to address their Nowlis survey because
14 that's what they claim does it. I listened to Mr. Pecau
15 carefully, and I credit him because I think he was careful, he
16 was careful. Mr. Nowlis didn't ask any questions about
17 infringement, didn't ask a one. He said, do you upload or
18 download free music? In bold. I ask the Court to look at the
19 survey instrument, that's in bold letters. And then in light
20 letters, through sites such as, several sites.

21 Now, I don't know about you, Your Honor, but I'd
22 never heard of any of those sites before this case. But if I
23 had been asked, do I download or upload free music through
24 sites such as gobbledygook, I would say yes. I got the card at
25 Starbucks and got my free download from Apple iTunes because of

1 my free card at Starbucks.

2 So the question didn't actually address infringement.

3 THE COURT: I will look at it.

4 MR. BRIDGES: And we have also got a Daubert motion
5 on file for Mr. Nowlis. There are more reasons to reject that
6 as incompetent evidence, but I will sit down, Your Honor,
7 unless you have any questions.

8 THE COURT: No, I don't. I have run out myself.
9 We're a little over two hours, and I think we should end for
10 today unless somebody has something urgent they need to talk
11 about.

12 Not having seen any hands in the quarter second I
13 gave you, we will end for today.

14 We'll keep looking at the issues. I appreciate the
15 briefing which was extensive and commensurate with the
16 professionalism of the parties here and obviously their
17 counsel. And the argument today has been very helpful, and I
18 appreciate you coming in. I know some of you have come a long
19 way. And you bring a lot of institutional knowledge that I
20 don't have. And I am trying to catch up and will continue to
21 try and catch up.

22 And we will get you out a decision on the issues that
23 are pending before us as soon as we can, but in a reasonable
24 period of time so that you can continue either to prepare for
25 trial or figure out how to resolve the situation.

1 I guess many of these cases didn't go to trial,
2 especially on some of the issues that we have discussed today
3 after these -- I think the Massachusetts and the Arizona cases
4 as far as we can tell never went to trial. So maybe that will
5 be moving farther along than they did.

6 But the point is, I will get you out a decision on
7 the pending issues as soon as we can and relatively soon.

8 When are the Daubert motions set? Are those next
9 week or two weeks?

10 MR. KELLEY: November 20.

11 THE COURT: November 20. Okay. So we have got some
12 time. All right, good.

13 All right. Well, I hope you all have a good weekend.
14 And we are in recess.

15 -----
16 HEARING CONCLUDED

17
18
19
20 I certify that the foregoing is a true and
21 accurate transcription of my stenographic notes.

22

23

24

25

/s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR